IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1157.

TOPPS CHEWING GUM, INC.,

Petitioner,

v.

FLEER CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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When defendants move for summary judgment on the basis of an affirmative defense and the District Court denies that motion for lack of evidence on an essential fact, is the District Court's order rendered appealable by the fact that the affirmative defense asserted was collateral estoppel?

COUNTERSTATEMENT OF THE CASE.[1]

This is an action by Fleer Corporation seeking injunctive relief and treble damages for violation of Sections 1 and 2 of the Sherman Act. The relevant market alleged in the Section 2 count is baseball trading cards, *i.e.*, the pocket-sized cards bearing pictures and biographical data of major league baseball players which are collected and traded by youthful baseball fans. The defendants are Topps Chewing Gum, Inc. ("Topps"), a competitor of Fleer, and the Major League Baseball Players Association ("Association"), an association of virtually all major league baseball players.

Among other defenses, the defendants argued, in a motion for summary judgment, that Fleer is collaterally estopped from bringing this action because, in 1965, the Federal Trade Commission held that baseball trading cards were not a cognizable market, but, rather a promotional device for the sale of gum. *See In the Matter of Topps Chewing Gum, Inc.*, 67 F.T.C. 744 (1965). Defendants said that, although the 1965 proceeding was instituted by the Commission under Section 5 of the Federal Trade Commission Act against Topps alone, Fleer is bound by the Commission's finding because Fleer registered a complaint with the Commission and Fleer's officers testified on behalf of the Commission.[2]

1. We have limited this counterstatement to the facts which we consider relevant to the question presented. No attempt has been made to answer all of the factual statements in the Petition, many of which appear irrelevant. Our failure to refute an irrelevant statement is not an admission of its correctness.

2. The Petition also asserts that Fleer filed briefs with the Commission, that it supplied much of the factual material for use by FTC counsel and that Fleer failed to avail itself of a statutory "right" to intervene. In support of their motion, defendants showed only that Fleer had filed a brief in support of a motion to quash a subpoena directed to Fleer. There was no showing of the extent of the factual material furnished by Fleer. As for intervention, the FTC Act does not grant any person the "right" to intervene. 15 U. S. C. § 45(b). The only decisions we have found

Fleer's response to the collateral estoppel defense was basically threefold. First, as a matter of fact, Fleer denied that it had sufficient participation in, or control over, the Commission proceedings to be bound thereby. Second, as a matter of law, Fleer argued that (a) it could not have participated in the FTC proceeding to a sufficient degree to be bound,[3] and (b) the FTC order could not form the basis for collateral estoppel in a subsequent action.[4] Third, Fleer contended that there have been changes in the anticompetitive restraints and the product market in the decade since the 1965 FTC order to such an extent that collateral estoppel would not apply.[5] *Commissioner v.*

2. (Cont'd.)
permitting intervention on the Commission's side are limited to the nature of the relief to be granted and imply that intervention on the merits would not be allowed. *See In the Matter of Campbell Soup Co., et al.*, 77 F.T.C. 664 (1970); *In the Matter of Firestone Tire & Rubber Co.*, 77 F.T.C. 1666 (1970).

3. The nature of a Section 5 proceeding and the role of a complaining person in such a proceeding was summarized by Justice Brandeis:

> "Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it." (Footnote omitted). *Federal Trade Commission v. Klesner*, 280 U. S. 19, 25-26 (1929).

4. Section 5(e) of the FTC Act provides, in part:

> "No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership or corporation from any liability under the Antitrust Acts." 15 U. S. C. § 45(e).

5. Major changes in the anticompetitive restraints are: (a) the Association's practice, beginning in 1966, of obtaining the exclusive

Sunnen, 333 U. S. 591 (1948); *Cromwell v. County of Sac*, 94 U. S. 351 (1877).

The District Court denied defendants' motion on the first ground advanced by Fleer, saying that defendants had "failed to come forward with any concrete evidence of Fleer's controlling activity". In so holding, it followed well established precedent to the effect that no one can be collaterally estopped by a decision in a proceeding where he was not a party and did not control a party. *See Restatement of Judgments* § 84 (1942); *Ransburg Electro-Coating Corp. v. Lansdale Finishers, Inc.*, 484 F. 2d 1037 (3d Cir. 1973). Having found defendants' proof deficient on the first ground, the District Court did not address the other two grounds put forward by Fleer.

The District Court's order does not purport to be (and could not be) a final disposition of the collateral estoppel defense. Defendants may still assert that defense at a subsequent stage in the proceedings. All that was decided is:

> "Since defendants have failed to produce any facts which would be probative of Fleer's *de facto* participation in the control of the FTC litigation, this Court finds that it has failed to meet its burden on this affirmative defense."

From this, defendants attempted, unsuccessfully, to appeal to the Court of Appeals under 28 U. S. C. § 1291 and this Court's decision in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

5. (Cont'd.)
right to represent the players for group licenses and (b) a 1968 agreement between the Association and Topps which, among other things, pools their influence and control over the players. An important change in the market is that, although Topps continues to market most of its baseball cards in a package containing gum, it has very substantially decreased the amount and value of gum and substantially increased the number of cards. Thus, if the cards were ever just a promotional device (which fact Fleer denies), they are no longer such.

ARGUMENT.

I. The District Court's Order Is Not Final.

It is hornbook law that the denial of a motion for summary judgment is not final and, therefore, not appealable under 28 U. S. C. § 1291. 9 *Moore's Federal Practice* ¶ 110.07 at 108, n. 6 (2d ed. 1948); 10 Wright and Miller, *Federal Practice and Procedure* § 2715 at 424 (1973). The reason is that, on a motion for summary judgment, the court must draw inferences from the underlying facts in the light most favorable to the party opposing the motion (*United States v. Diebold, Inc.*, 369 U. S. 654, 655 (1962)) with the result that "the denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim". *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U. S. 23, 25 (1966).

The petitioner[6] would have this Court believe that the hornbook rule does not apply here because, according to the petitioner, the District Court's order "constitutes a final rejection" of the collateral estoppel defense. This is not the case. The District Court did not have to decide (and did not decide) whether to accept or reject the defense. It merely denied a motion for summary judgment because defendants had failed to prove an essential factual element of the defense. The defendants are not precluded from bringing forward additional evidence on the same issue at a later stage. Fleer is not precluded from arguing that collateral estoppel is unavailable as a matter of law; nor from showing that collateral estoppel is inapplicable because of changes in the market and in the

6. The Association joined in the motion for summary judgment and the attempted appeal but has declined to join in the Petition, which was filed by Topps alone.

anticompetitive restraints; nor from showing that, even if barred by collateral estoppel on one Count, Fleer could still recover under the other Count. In short, both the availability of collateral estoppel and the effect thereof on Fleer's causes of action remain to be decided.

This is not a situation in which to apply the rule of *Cohen v. Beneficial Industrial Loan Corp., supra,* which is concerned only with a "small class [of orders] which *finally determine* claims of right separable from, and collateral to, rights asserted in the action. . . ." (337 U. S. at 546, emphasis added).

II. The Analogy to Double Jeopardy Is Invalid.

Since the order of the District Court did not finally determine defendants' claim to collateral estoppel, there is no reason for this Court to consider whether an order constituting a final determination would be subject to immediate appeal under *Cohen.* Consequently, there is no need to refute at length the analogy that petitioner seeks to draw between the defense of collateral estoppel in this case and the defense of double jeopardy asserted in *Abney v. United States.*[7] We do, however, point out the following distinctions:

(a) The double jeopardy claim in *Abney* was a constitutional "guarantee against being twice put to *trial* for the same offense" (431 U. S. at 661, emphasis in original). Collateral estoppel in a civil case does not have constitutional standing nor does it guarantee against a second trial.

(b) The applicability of the double jeopardy claim in *Abney* could be determined from the face of the indictment. The availability and effect of collateral estoppel[8] cannot be determined without a full exploration of the facts. Parenthetically, we note that, in the instant case, if defendants were able to shore up their deficient proof on the issue of Fleer's control, a trial would still be necessary on the issues of changes in the market and the restraint.

7. 431 U. S. 651 (1977).

Collateral estoppel should be classified, not with the constitutional protection against double jeopardy, but rather with other civil defenses such as lack of subject matter jurisdiction and lack of jurisdiction over the person or improper venue. All of these are unrelated to the merits and, if determined preliminarily, will abort the trial, but they are all subject to appeal only after disposition of the case. *See Catlin v. United States,* 324 U. S. 227, 236 (1945); *American Concrete Agricultural Pipe Association v. No-Joint Agricultural Pipe Association,* 331 F. 2d 706, 709 (9th Cir. 1964).

There is no conflict between the Third Circuit's order determining the appeal in this case and the two decisions of the Eighth Circuit cited by the petitioner. In *Piper Aircraft,*[9] the Eighth Circuit accepted an appeal from a final refusal to certify a class based on a holding that the plaintiff was collaterally estopped by the court's refusal to certify a similar class in prior litigation. The situation fully satisfied the *Cohen* requirement of finality, which is not satisfied in the instant case. In *Barket,*[10] that court accepted an appeal on the issue of collateral estoppel as part of an appeal from a denial of a claim of double

8. Collateral estoppel by definition applies not to offenses, but to legal and factual issues. *Lawlor v. National Screen Service,* 349 U. S. 322, 326 (1955).

9. *In re Piper Aircraft Distribution System Antitrust Litigation,* 551 F. 2d 213 (8th Cir. 1977).

10. *United States v. Barket,* 530 F. 2d 181 (8th Cir. 1976), *cert. denied,* 429 U. S. 917 (1976).

jeopardy in a criminal case. The decision is distinguishable on the same grounds as *Abney.*

The Petition cites no precedent for the remarkable proposition which it asserts, namely, that the denial of a motion for summary judgment on factual grounds is final and appealable under 28 U. S. C. § 1291.[11] There is, therefore, no occasion for this Court to resolve conflicting decisions or to clarify issues.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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11. The decision of the District of Columbia Circuit Court in *McSurely v. McClellan,* 521 F. 2d 1024 (1975), *modified on rehearing,* 553 F. 2d 1277 (D. C. Cir. 1976) (en banc), *cert. granted,* 46 U. S. L. W. 3238 (Oct. 11, 1977), does involve an appeal from a denial of a motion for summary judgment. That case, like *Abney,* involved a specific constitutional guarantee (the guarantee of immunity for members of Congress from questioning outside the Congressional chambers) which would be nullified if improperly denied at the outset of the case. However, a majority of the Court of Appeals found that the defendants would be entitled to invoke the constitutional guarantee even if all factual issues were resolved in plaintiff's favor—a finding that could not be made in the instant case.